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IN THE

Supreme Court of the United States

OCTOBER TERM 1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS.

LLOYD PAUL STRYKER,
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Joseph J. Weiss.

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REPLY BRIEF OF THE PETITIONERS.

1. The Government concedes that this case "would clearly be an appropriate one for review by this Court",[1] except that a claimed "distinction" lies between the instant case and the other pertinent decisions in that the Government agents in this case who had intercepted the communications did not testify to them. The Court below did not recognize any such distinction despite its presentation by the Government.[2] The attempted distinction was so lacking in merit that the Court below did not even deign to mention it in its opinion. It held that the communications were admissible because it regarded[3] the decision in *Valli* v. *United States*,[4] rather than in the *Diamond* and *Sablowsky* cases as properly interpreting Section 605. If the Government's argument, which was presented to the Court below were sound, the Court below, it is submitted, would have distinguished this case from *all* those decisions—including the cases relied upon by petitioners—rather than choose between the conflicting holdings.

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[1] P. 3 Govt. reply memorandum to petition.

[2] P. 3 Govt. reply memorandum to petition.

[3] P. 5 opinion Court below.

[4] 94 Fed. (2d) 687.

The unsoundness of the argument is manifest. "The privacy of the conduit" and of the communications passing through it were intended to be secured by the act.[1] The statute goes further than the mere prohibition against interception, for it bars divulging the existence or contents after interception. The statute bars publication both in and out of Court. It expressly provides that no unauthorized person shall "divulge or publish" such intercepted message "to any person". The word "any" this Court has held in the *Nardone* case[2] means all. In the instant case stenographers in the employ of the insurance companies listened to the intercepted communications. They took stenographic notes. The records were played, it is clear from the case on appeal, to the Government agents and the United States Attorneys. They were stenographically transcribed. The stenographic transcripts were produced by the Assistant United States Attorneys. They did not transcribe the messages. Consequently when they received the transcripts there was a divulging and publication in contravention of the statute. Were it not for the interception and for the publication by those who intercepted[3] to the Federal agents themselves, the Government would not have had such proof. There was thus a divulging before the trial commenced.

Moreover the Government concedes that upon the trial the defendants Nelson, Berger, Spitz and Dr. Messman identified the communications. The Government admits that the records containing the communications were played in open court. Inspector Shea testified concerning the recordings.[4] Realistically speaking, the medium of proof was in substance the same as though the agents had testified fully to the conversations. There can be no doubt that, in fact, the contents of the intercepted communications were "divulged" in court.

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[1] *Diamond* v. *U. S.*, 94 Fed. (2d) 1012.

[2] 302 U. S. 379.

[3] Acting for the Government.

[4] Pp. 586-588.

A reading of this record cannot help but force one to conclude that the testimony of Nelson, Berger, Spitz and Messman if not induced, as they said, by promises of leniency, was induced by hopes and expectations of leniency. Their expectations were realized. Messman's license to practice medicine was not revoked by any proceedings of the Government and he continued to practice medicine with the knowledge of the United States Attorney.[1] He was not required by the Government to plead to the indictment. He was paid by the Government.[2] He has not been sentenced according to the docket entries contained in this record. Nelson was also paid a weekly stipend by the Government.[3] His sentence was suspended; Berger's sentence was suspended; Spitz's sentence was suspended.[4]

The Government presents in this Court the argument it presented in the Court below that Section 605 does not forbid the authorized publication of intereepted communications and that since the communications were divulged in the case at bar with the sanction of one of the parties to the conversation, the statute was not violated.

This contention is without merit. The statute provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish * * * such intercepted communication". Thus, consent or authority must precede the interception as well as the publication of the intercepted message. The Government's argument[5] that the Section permits the divulgence of intercepted communications if the sender has authorized such divulgence, begs the entire question. Even though a person who divulges a com-

[1] Pp. 596, 31-40.
[2] P. 868.
[3] Pp. 365-6.
[4] Pp. 31-39.
[5] P. 6 Answering memorandum of Government.

munication was authorized by the sender so to do, he could not, according to the plain mandate of the statute, do this in the absence of authority to intercept. His authority from the sender must include both interception and divulgence.

Even the Government does not go so far as to contend that in the instant case a party to the conversation authorized the *interception*. No subsequent permission to divulge—for whatever the inducement may have been—given by one of the parties to a conversation could afford an original license to tap the wires.

The vice which the statute was designed to eradicate was the pernicious practice of wire-tapping. To give effect to that purpose it has been deemed necessary to exclude from evidence in federal courts the products of the illegal practice. Now the Government urges that the expedient of arresting one of the parties to a conversation and inducing him to "disclose" it, should entitle the prosecution to place wire-tapped phonograph records in evidence and thus frustrate the objects of the law. To sanction such a course would render the statute substantially ineffective.

The Government contends that since one of the parties to certain of the conversations pleaded guilty and testified for the Government he presumably authorized the disclosure of the conversations and that such authorization constitutes consent by the "sender" of the communication within the meaning of Section 605. The answer to such an argument is manifest. Each party to a telephone conversation is the "sender" with respect to his particular portion of the conversation. The obvious purpose of the statute is to protect a party to a conversation from its interception and disclosure without his consent. To permit such interception and disclosure solely upon the consent of the other party to the conversation is in effect to nullify the statute.

The Government also maintains that neither party to a conversation has an exclusive property right in it, since either party could testify to its substance without the consent of the other. This may be true as a general common-law principle, but it obviously has no bearing upon the construction of Section 605. The statute expressly prohibits interception and publication without the consent of the sender. Hence, in considering the effect of the statute, consent of the "sender" is manifestly necessary, and any general common-law principle to the contrary has no application.

The statute was designed, as the Circuit Court of Appeals said in the *Diamond* case, to secure the privacy of the instrumentality and the communications passing over it. The statute was thus aimed to protect the communication and to prevent its divulgence without the consent of both parties.

We must take a realistic view of what would occur if the Government's argument were accepted. Agents would intercept in the hope that by some course of conduct "sanction" could be procured from one of the parties. If "sanction" was not induced, the results of interception could then be injected into the record under the guise of cross-examination, as was done in this case when the defendant Weiss was cross-examined concerning alleged telephonic communications,[1]—not in evidence—which, parenthetically speaking, the Government states in its reply memorandum were used "merely for the purpose of refreshing the recollection of the petitioner Weiss on cross-examination".[2]

Whether it was intended to refresh Weiss' recollection is irrelevant. The point is that the contents of the intercepted communications not in evidence were placed before the jury in the guise of questions and were thus divulged.

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[1] Pp. 1908-1929, 1966-1969, 2000-2003.

[2] P. 2, Government's memorandum.

2. It is respectfully submitted that as to the other questions raised by petition the defendants were improperly cross-examined, their character witnesses were likewise prejudicially cross-examined. They were also prejudiced by the highly improper summation.

3. It is submitted that it was vital for the trial judge to charge the jury as requested concerning the statutory fees of Government witnesses. The jurors may very well have received the impression that the Government had authority to pay weekly stipends, as it did. The jurors were entitled to know whether the Government itself in its effort to convict the defendants, went beyond the rights conferred upon it by statute.

It is submitted that the points referred to in paragraphs 2 and 3 on pages 7 and 8 of the Government's memorandum themselves warrant certiorari. The questions there presented are of a fundamental character; they present to this court a question as to whether the defendants received a fair trial as guaranteed to them by the Constitution. The language of the New York Court of Appeals in the case of *People* v. *Wolf*[1] where a witness was improperly cross-examined and the language of Miller, *J.* in *People* v. *Marendi*[2] is applicable to the case at bar. Judge Miller said:

> "We frequently hear it said that a particular matter complained of did not affect the result, when it is patent that it was introduced in the belief that it might improperly influence the result. Our disregard of such errors seems to be taken as authority for their repetition and extension in other cases.
>
> What are technical errors[3] not affecting the sub-

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[1] 183 N. Y. 464, 472.

[2] 213 N. Y. 600, 619.

[3] We call the court's attention to the fact that the Court of Appeals is required to give judgment "without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." (Code Criminal Procedure, section 542.)

stantial rights of the parties? It would require some boldness to hazard an all-inclusive definition, and I shall confine myself to exclusion. * * * Such a course will simply mean in the long run the abolishing of all forms of law taught by experience to be necessary to the protection of the innocent and the decision of criminal cases on appeal solely on the facts. If trial by jury is to be maintained, the right of every accused person to be tried in accordance with established forms of law must be respected. * * * but where prejudicial matter is erroneously received in evidence on a disputed question of fact, its harmful character cannot be determined solely by the mere weight of competent evidence unless we are to resolve ourselves into a jury and, ignoring the finding upon incompetent evidence, substitute one upon the evidence which we may deem competent."

CONCLUSION.

The writ of certiorari should be granted. The conflict in authority with regard to the interception of intrastate communications should be settled.

The questions of the interception of telephone communications, of the propriety of the cross-examination of the defendants and of their character witnesses, and the summation are of far-reaching importance to the rights and liberties of American citizens and those who stand accused in the courts of justice of the United States. We can, therefore, conceive of no case involving more "special and important reasons"[1]

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[1] Rules Supreme Court of United States, sec. 38, subd. 5.

for granting certiorari than those presented in the case at bar.

Respectfully submitted,

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